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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CAMERON JORON STEPNEY,

Defendant and Appellant.

D075171

(Super. Ct. No. FWV1600164)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BRYSON RASHAD JOHNSON,

Defendant and Appellant.

D075454

(Super. Ct. No. FWV1600164)

CONSOLIDATED APPEALS from judgments of the Superior Court of San Bernardino County, Ingrid A. Uhler, Judge. Judgment against Stepney affirmed as modified. Judgment against Johnson affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant Cameron J. Stepney.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Michael B.R. Johnson.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent in D075171.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent in D075454.

In a previous appeal, we vacated the sentences imposed on Cameron Joron Stepney and Michael Bryson Rashad Johnson, and we remanded for resentencing to allow the trial court to exercise its newly-enacted discretion under Penal Code section 12022.53, subdivision (h) to strike or dismiss various firearm enhancements. (*People v. Johnson* (July 20, 2018, D073713) [nonpub. opn.].)¹ At Stepney's resentencing, the trial court struck one enhancement. At Johnson's resentencing, the court declined to strike any enhancement (though it modified his sentence in other ways).

Stepney and Johnson appeal. They contend the trial court misunderstood the scope of its discretion under section 12022.53, subdivision (h). They argue that the trial

¹ Subsequent statutory references are to the Penal Code unless otherwise specified. We grant Stepney's unopposed request for judicial notice of (1) our prior opinion and (2) the calendars for the years 2016 through 2019.

court had the authority to impose a lesser included enhancement under section 12022.5, in addition to striking or dismissing the charged enhancements under section 12022.53. We disagree that the trial court had such authority and accordingly reject their contention. Stepney also argues that the trial court erred in calculating his postsentence custody credits. The Attorney General concedes the court erred, and we accept this concession. We therefore modify the judgment against Stepney to correct his custody credits and affirm the judgment as modified. We affirm the judgment against Johnson in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2016, Stepney and Johnson entered a pharmacy in Fontana, California, along with a third man, Kwame Michion Simmons. Stepney and Johnson were armed with handguns. They demanded that the pharmacist and a technician lie on the floor and proceeded to take various prescription drugs, including Xanax and the opioid Norco. After leaving the pharmacy, they were spotted by police and eventually arrested. (A more detailed factual statement appears in our prior opinion, *People v. Johnson, supra*, D073713.)

Following a jury trial, Stepney and Johnson were convicted of two counts each of second degree robbery. (Pen. Code, § 211.) The jury found, as to each count, that they personally used firearms in the commission of each offense. (*Id.*, § 12022.53, subd. (b).) The jury also convicted Johnson of assault with a deadly weapon, other than a firearm, against a peace officer (*id.*, § 245, subd. (c)) and reckless driving while evading a peace officer (Veh. Code, § 2800.2, subd. (a)).

The trial court initially sentenced Stepney to a determinate term of 17 years 4 months in prison, consisting of the middle term of 3 years for the first robbery conviction, 10 years for the corresponding firearm enhancement, one-third of the middle term of 3 years for the second robbery conviction (or 1 year), and one-third of the 10-year term for the second firearm enhancement (or 3 years 4 months). The court sentenced Johnson to a determinate term of 20 years 8 months in prison, consisting of the upper term of 5 years for the first robbery conviction, 10 years for the corresponding firearm enhancement, one-third of the middle term of 3 years for the second robbery conviction (or 1 year), one-third of the 10-year term for the second firearm enhancement (or 3 years 4 months), and one-third of the middle term of 4 years for the assault conviction (or 1 year 4 months). It also sentenced Johnson to the middle term of 2 years, to run concurrently, for the evading conviction.

As noted, in our prior opinion, we vacated Stepney and Johnson's sentences and remanded the matter to the trial court in order to allow it to exercise its newly-enacted discretion under section 12022.53, subdivision (h) to strike or dismiss Stepney and Johnson's firearm enhancements. The court held separate resentencing hearings for each defendant.

At Stepney's resentencing, the court found persuasive his statement of remorse and his positive record in prison to date. But it remained convinced that his offenses were quite serious. It therefore restructured Stepney's sentence to reduce the overall determinate term by a modest amount, one year four months. It imposed the upper (rather than middle) term for his first robbery conviction (5 years), retained the

corresponding firearm enhancement (10 years), imposed the same one-third of the middle term of 3 years for the second robbery conviction (or 1 year), and struck the second firearm enhancement. Stepney's total term following resentencing was 16 years in prison.

At Johnson's resentencing, the court was also somewhat impressed by his progress in prison. The court believed Johnson had "grown some" but his offenses were still "extremely, extremely serious and violent." The court declined to strike Johnson's firearm enhancements. But it chose to run the sentence for Johnson's assault conviction concurrently, rather than consecutively. It again imposed the upper term of 5 years for the first robbery conviction, 10 years for the corresponding firearm enhancement, one-third of the middle term of 3 years for the second robbery conviction (or 1 year), and one-third of the 10-year term for the second firearm enhancement (or 3 years 4 months). His four-year sentence for the assault conviction and two-year sentence for the evading conviction would run concurrently. Johnson's total term following resentencing was 19 years 4 months in prison.

DISCUSSION

I

Discretion to Reduce Sentencing Enhancements

Section 12022.53, subdivision (h) provides, in relevant part, as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." Section 1385, in turn, states that a judge or magistrate may, "in [the]

furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) Where the court has the authority to strike or dismiss an enhancement, "the court may instead strike the additional punishment for that enhancement" (§ 1385, subd. (b)(1).)

The purpose of these statutes is to accord flexibility to the trial court in sentencing an individual defendant. " 'Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty, treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender.' " (*People v. Williams* (1981) 30 Cal.3d 470, 482, quoting *People v. Dorsey* (1972) 28 Cal.App.3d 15, 18.)

Stepney and Johnson contend that the trial court had the authority under section 12022.53, subdivision (h) to reduce the firearm enhancement charged and found true by the jury to a lesser-included enhancement. The enhancement charged and found true by the jury applies to personal use of a firearm in the commission of certain specified felonies. (§ 12022.53, subd. (b).) The allegedly lesser-included enhancement applies to personal use of a firearm in the commission of any felony or attempted felony. (§ 12022.5, subd. (a).) Because this contention raises an issue of statutory interpretation, we review it de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 96; *People v. Tirado* (2019) 38 Cal.App.5th 637, 642 (*Tirado*), review granted Nov. 13, 2019, S257658.)

Stepney and Johnson rely primarily on *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*). *Morrison* considered a related issue, whether a trial court had the authority to reduce a personal-discharge firearm enhancement causing great bodily injury under subdivision (d) of section 12022.53 to either a personal-discharge firearm enhancement under subdivision (c) or a personal-use firearm enhancement under subdivision (b). (*Morrison*, at p. 221.) *Morrison* noted that " '[s]ection 12022.53 sets forth . . . escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies ' " (*Ibid.*) It recognized existing caselaw that a trial court "may impose a 'lesser included' enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence." (*Id.* at p. 222.) *Morrison* concluded, "We see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385." (*Id.* at pp. 222-223.) "The court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385." (*Id.* at p. 223.)

More recently, *Tirado*, *supra*, 38 Cal.App.5th 637, review granted, considered the same issue as *Morrison* but came to the opposite conclusion. It held, "The only section 12022.53 enhancement charged and found true by the trier of fact was subdivision (d). We conclude that, although the trial court had the discretion to strike or

dismiss that enhancement pursuant to sections 1385 and 12022.53, subdivision (h), it did not have the discretion to substitute another enhancement for it." (*Tirado*, at p. 640.)

Tirado focused on the plain language of the relevant statutes: "Nothing in the plain language of sections 1385 and 12022.53, subdivision (h) authorizes a trial court to substitute one enhancement for another. Section 12022.53, subdivision (h) uses the verbs 'strike' and 'dismiss,' and section 1385, subdivision (a) states the court may 'order an action to be dismissed.' This language indicates the court's power pursuant to these sections is binary: The court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement." (*Tirado*, *supra*, 38 Cal.App.5th at p. 643, review granted.) "Had the Legislature intended to grant the trial court the power to modify or reduce a firearm enhancement, it would have done so with express language. Sections 1385 and 12022.53, subdivision (h) contain no such language." (*Ibid.*)

Tirado emphasized that its conclusion was consistent with longstanding principles of separation of powers. " '[P]rosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine . . . what charges to bring.' " (*Tirado*, *supra*, 38 Cal.App.5th at p. 644, review granted.) "In the instant case, the prosecution could have alleged all three section 12022.53 enhancements, and if it had done so, the jury would presumably have found all three true. In that circumstance, the court would have had the discretion to strike the section 12022.53, subdivision (d) enhancement and then either impose one of the other two enhancements or strike them as well. However,

because the People exercised their charging discretion to allege only one enhancement, the trial court was limited to either imposing or striking that enhancement." (*Ibid.*)

Tirado distinguished authorities where a trial court imposed a lesser included enhancement where the greater was inapplicable or factually unsupported. (*Tirado, supra*, 38 Cal.App.5th at p. 644, review granted.) It noted, "the enhancement at issue here was neither unsupported by the law nor unsupported by the evidence." (*Ibid.*)

After considering *Morrison* and *Tirado*, and pending further guidance from our Supreme Court, we agree with *Tirado*. The plain language of the relevant statutes compels the conclusion that a trial court has the authority to strike or dismiss an enhancement, or the punishment therefor, but not to substitute a lesser included enhancement. We recognize that our Supreme Court in *People v. Marsh* (1984) 36 Cal.3d 134, 143 held that " '[t]he authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part.' " But *Marsh* involved factual allegations of ransom and bodily harm during kidnapping that were "similar in effect to prior conviction and weapons use findings in that they require an enhanced sentence." (*Ibid.*) *Marsh* approved the straightforward dismissal of these individual factual allegations in connection with a kidnapping charge, just as a court may strike or dismiss a prior conviction or weapons use finding. (*Ibid.*; see *People v. Lara* (2012) 54 Cal.4th 896, 901 [section 1385 "permits courts to dismiss, or 'strike,' factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence"].) *Marsh* did not consider, let alone approve of, reducing a sentencing enhancement to a lesser included enhancement. As *Tirado* notes, aside from *Morrison*, we are not aware of "any

authority interpreting section 1385 to include the power to modify, change, or substitute a charge or enhancement. Had the Legislature intended the trial court's power to be broader than what is proscribed by section 1385, it would have said so." (*Tirado, supra*, 38 Cal.App.5th at p. 643, review granted.)

Stepney contends it would be "absurd to conclude that the Legislature granted to the courts the discretion to strike an enhancement but it intentionally withheld the discretion to *reduce* the enhancement." We disagree. This limit on the court's authority preserves the prosecution's traditional authority to determine which charges to bring against a defendant. "The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.' " (*Tirado, supra*, 38 Cal.App.5th at p. 644, review granted.) Indeed, "[p]rosecutors have great discretion in filing criminal charges. [Citation.] This discretion includes the choice of maximizing the available sentence (including charging of enhancements) to which a defendant might be exposed in the event of conviction" (*People v. Bizieff* (1990) 226 Cal.App.3d 130, 138.)

We recognize the intent of the Legislature to allow trial courts to impose individualized sentences according to a defendant's specific circumstances. But the authority of the trial courts in this regard is not unlimited. The plain language of the statute does not support the sentencing option proposed by Stepney and Johnson. The trial court here did not abuse its discretion by not considering it. In light of our conclusion we need not decide whether Stepney and Johnson forfeited their contentions by failing to raise them in the trial court.

II

Postsentence Custody Credits

Stepney contends, and the Attorney General agrees, that the trial court erred in its calculation of postsentence custody credits. "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts." (§ 2900.1.) "[T]he trial court, having modified defendant's sentence on remand, was obliged, in its new abstract of judgment, to credit him with all *actual* days he had spent in custody, whether in jail or prison, up to that time." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 37.)

Here, the trial court listed 310 days of custody credits in its amended abstract of judgment following resentencing. This number does not account for Stepney's 778 days of custody following his original sentencing. The parties agree that these days should be included, and the abstract of judgment should be amended to award Stepney a total of 1,088 actual custody credits. We agree as well and modify the judgment accordingly. (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118-1119.)

The parties also agree that the amended abstract of judgment mistakenly includes the date of the original sentencing hearing, not the resentencing hearing. We modify the judgment to correct that date as well.

DISPOSITION

The judgment against Stepney is modified to reflect 1,088 days of actual custody credits and to correct the date of the resentencing hearing to January 4, 2019. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

The judgment against Johnson is affirmed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.